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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 731

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., APPELLANTS

v.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Appellees move to dismiss this attempted appeal on the ground that this Court is without jurisdiction under 28 U.S.C. 1254(2) because the Court of Appeals did not invalidate any state statute.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B)[1] is reported at 225 F. 2d 349. Earlier stages of

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[1] Except for the notices of appeal of each appellant, the transcript of record on this appeal is the record on the petition for a writ of certiorari in *Mallonee, Bucklin and Fergus, Shareholders' Protective Committee, et al.* v. *Federal Home Loan Bank of San Francisco, et al.*, No. 611, this Term, certiorari denied, February 27, 1956.

Accordingly, all record references are to the record in No. 611, this Term. The references to Pet. App. B are to Appendix B to the petition for certiorari in No. 611.

this litigation which have been before this Court include *Fahey* v. *Mallonee*, 332 U. S. 245; *Ex parte Fahey*, 332 U. S. 258; *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336 (C. A. 9), certiorari denied, 345 U. S. 952, rehearing denied, 345 U. S. 978; *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420 (C.A. 9), certiorari denied, 345 U.S. 952, rehearing denied, 345 U.S. 978; *Fahey* v. *Calverley*, 208 F. 2d 197 (C. A. 9), certiorari denied, 347 U. S. 955.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1955 (Pet. App. B). A timely petition for rehearing filed on August 15, 1955, was denied on October 12, 1955 (Tr., Vol II, Docs. 17, 20). Notices of appeal were filed in the Court of Appeals on January 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(2), but appellees submit, for the reasons stated *infra*, pp. 5-8, that this Court has no jurisdction of this appeal.

QUESTION PRESENTED

Whether this Court has jurisdiction by appeal, under 28 U.S.C. 1254(2), on the ground that the Court of Appeals held invalid—as repugnant to the Constitution, treaties or laws of the United States—provisions of the California Civil Code and Code of Civil Procedure pertaining to the foreclosure and sale of pledged property and to actions to quiet title, where the Court of Appeals merely (1) ordered the issuance of a writ of mandamus to the District Court requiring compliance with a 1953 mandate of the Court of Appeals in this litiga-

tion, and (2) ordered the issuance of an injunction restraining appellants from relitigating certain issues finally adjudged against them on earlier appeals in the litigation.

STATEMENT

For a description of the basic litigation, various stages of which have been before the District Court for the Southern District of California, the Court of Appeals for the Ninth Circuit, and this Court since 1946, the Court is respectfully referred to the Brief for the Respondents in Opposition in No. 611, this Term (pp. 3-11), certiorari denied, February 27, 1956.

The judgment of the Court of Appeals from which this appeal is taken is the same judgment review of which was sought by these appellants in No. 611, this Term. By that judgment the Court of Appeals found that the District Court had for more than two years failed to comply with the mandate issued by the Court of Appeals in 1953 on earlier appeals in this litigation and that appellants here were seeking to relitigate all the issues which had already been determined in the litigation by the Court of Appeals, with the purpose of frustrating and nullifying the earlier decisions of that court and of subjecting appellees here to harassment and expense by such attempted relitigation. Accordingly, the Court of Appeals ordered the issuance of a writ of mandamus to the District Court and the issuance of an injunction restraining appellants here from maintaining any action bringing in question issues already finally adjudicated by the Court

of Appeals (Pet. App. B, pp. 21-32, 57-72; 225 F. 2d at 363-370, 384-394).

The writ of mandamus required the District Court to dismiss appellants' basic action and to return to appellee Federal Home Loan Bank of San Francisco promissory notes in the face amount of $6,300,000 executed by appellant Long Beach Association (acting through a conservator appointed in 1946 by the Federal Home Loan Bank Commissioner[2] upon charges of mismanagement of the Long Beach Association), together with some $7,000,000 in United States Government bonds and cash which the bank had held as collateral security for the promissory notes but which the District Court had earlier required the bank to deposit in its registry (Pet. App. B, pp. 9-12, 60-65; 225 F. 2d at 356-357, 386-390).

The injunction issued by the Court of Appeals restrains appellants from maintaining any action bringing in question (a) the validity of the appointment of the conservator of petitioner Long Beach Association; (b) that petitioners are precluded by their failure to resort to the available administrative remedy from obtaining any judicial relief based on the alleged invalidity of the appointment of the conservator; or (c) the validity of the action of the Federal Home Loan Bank Administration in estab-

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[2] By virtue of Reorganization Plan No. 3 of 1947 (61 Stat. 954, 5 U. S. C. 133y (p. 147)), the Home Loan Bank Board succeeded to the functions of the Federal Home Loan Bank Commissioner. By Sec. 109 (a) of the Housing Amendments of 1955 (Act of August 11, 1955, 69 Stat. 635, 641) the name of the Home Loan Bank Board was changed to Federal Home Loan Bank Board.

lishing appellee Federal Home Loan Bank of San Francisco (Pet. App. B, pp. 66-72; 225 F. 2d at 390-394).

These writs leave the Long Beach Association free, however, to defend a pending action which appellee San Francisco Bank filed in a California state court against appellant Long Beach Association to collect the promissory notes, and which Long Beach Association has removed to the District Court, on any ground pleaded in its answer (e.g., lack of consideration, statute of limitations) other than the issues already adjudicated by the Court of Appeals (Pet. App. B, pp. 21-23; 225 F. 2d at 363-364; see also Jurisdictional Statement, p. 5).

ARGUMENT

Most of the Jurisdictional Statement repeats the charges and the contentions which were the basis for the unsuccessful petition for certiorari in No. 611. Those arguments are irrelevant here, for this purported appeal under 28 U.S.C. 1254(2) must rest on the view that the Court of Appeals held *invalid*, as repugnant to the Constitution, treaties or laws of the United States, provisions of the California statutes which authorize a pledgee to foreclose the right of redemption in pledged property by a judicial sale and which provide for an action to quiet title to real or personal property and for an action for determining an adverse claim for money or property which the defendant makes against the plaintiff. California Civil Code, § 3011; California Code of Civil Procedure, §§ 738, 739, 1050, set

forth in the Appendix, *infra*, pp. 10-11 (see also Jurisdictional Statement, pp. 10-11).

As appellants concede (Jurisdictional Statement, p. 7), neither the judgment nor the opinion of the Court of Appeals makes any reference whatever to any of these California statutory provisions assertedly invalidated. Particularly in view of the fact that one member of the panel of the Court of Appeals (Circuit Judge Stephens) is from the California Bar, it is scarcely conceivable that that court would have invalidated these California statutes *sub silentio*. And in truth, the judgment of the Court of Appeals directing the issuance of the writs of mandamus and injunction has no bearing whatever upon these provisions of California law and certainly did not invalidate those provisions in any way.

The only force of the judgment of the Court of Appeals is (1) to enforce its 1953 mandate issued in this litigation requiring the dismissal of appellants' basic action as beyond the jurisdiction of the District Court and the restoration to appellee San Francisco Bank of its possession of the promissory notes and collateral therefor which the District Court, acting beyond its jurisdiction, had required the San Francisco Bank to deposit in its registry; and (2) to enjoin appellants from nullifying the earlier decisions of the Court of Appeals in this litigation and harassing appellees by seeking repeatedly to relitigate issues already finally adjudicated adversely to them by the Court of Appeals.

Assuming that California law controls the rights and obligations of the parties to the notes,[3] these writs of mandamus and injunction do not void the state statutes. Appellant Long Beach Association, the maker of the notes, remains free to defend the suit of appellee San Francisco Bank to collect them, on any grounds pleaded other than those already finally adjudicated by the Court of Appeals. The writ of mandamus merely restores the San Francisco Bank to its position as a pledgee in possession of the notes and collateral, the possession from which the Bank was wrongfully ousted by the District Court. Apart from the restoration of possession to the bank, neither the writ of mandamus nor the writ of injunction affects the conditions or procedures under which the bank may deal with the collateral or collect the notes, except that appellants may not vexatiously relitigate adjudicated issues as to the validity of the appointment of the conservator and the establishment of the San Francisco

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[3] The Court need not now consider whether the provisions of California law with respect to the foreclosure of pledges and quiet title actions apply to commercial paper issued to appellee San Francisco Bank in the performance of its credit functions as a federal instrumentality. *Fahey* v. *O'Melveny & Myers*, 200 F. 2d 420, 445, 446 (C.A. 9), certiorari denied, 345 U.S. 952, rehearing denied, 345 U.S. 978. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *National Metropolitan Bank* v. *United States*, 323 U.S. 454.

It may be noted that a holding by a Court of Appeals that federal, rather than state, law governs the transactions of a federal instrumentality would not be an *invalidation* of a state statute within the scope of 28 U.S.C. 1254(2), unless perhaps the state statute were construed as necessarily applying to the federal transactions even if that result would be unconstitutional or invalid.

Bank. Likewise, the writs do not affect the rights of the parties to maintain quiet title actions, other than to confine the District Court to cases within its jurisdiction and to restrain appellants' harassment of appellees. Insofar as they are applicable —as properly construed—the California statutes to which appellants refer can still govern. The Court of Appeals did not void or invalidate them in any way.

Accordingly, since the Court of Appeals did not invalidate any California statute as repugnant to the Constitution, treaties or laws of the United States, this appeal should be dismissed for lack of jurisdiction. *Bradford Electric Light Co.* v. *Clapper,* 284 U. S. 221; *Public Service Commission of Indiana* v. *Batesville Telephone Co.,* 284 U. S. 6.

CONCLUSION

It is respectfully submitted that this appeal should be dismissed for want of jurisdiction under 28 U. S. C. 1254(2).

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Counsel for Federal Home Loan Bank of San Francisco.

MARCH, 1956.

APPENDIX

Civil Code of California

§3011. Pledgee may foreclose right of redemption. Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale. [Enacted 1872.]

Code of Civil Procedure of California

§ 738. [*Action to quiet title to real and personal property.*] An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real or personal property, the validity or interpretation of any gift, devise, bequest or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will is admissible in evidence; and all questions concerning the validity of any gift, devise, bequest or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; provided, that if the said will shall have been admitted to probate and interpreted by a decree of the superior court sitting in probate which decree has become final such interpretation shall be conclusive as to the proper construction of said will, or any part thereof, so construed, in any action under this

section; and provided, however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given. [Enacted 1872; Am. Stats. 1895, p. 72; Stats. 1901, p. 159 (unconstitutional); Stats. 1921, p. 542.]

§ *739. When plaintiff cannot recover costs.* If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. [Enacted 1872.]

§ *1050. Actions to determine adverse claims, and by sureties.* An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety. [Enacted 1872.]

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IN THE

Supreme Court of the United States

October Term, 1955.
No. 731.

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, HOME INVESTMENT COMPANY,
Appellants,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

OPPOSITION OF APPELLANTS TO MOTION TO DISMISS APPEAL.

THIS COURT HAS JURISDICTION OF THESE APPEALS.

Congress, by 28 U. S. C. §1254(2)[1], gave appellant 8,000 homeowners, and other appellants, the right to be heard *on the merits in this Court* on this appeal.

Appellees, by a motion to dismiss, ask this Court to refuse to even hear or consider what Congress expressly made the duty of this Court to decide, *i.e.*, invalidation of California (or other) state statutes, as repugnant to the laws of the United States.

---

[1]28 U. S. C. §1254(2) confers a right of direct appeal to this Court:

". . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States, . . ."

Congress thought this subject so vital to the welfare of all of the 48 states that Congress removed it from the field of discretionary review by certiorari, and made it the mandatory duty of this Court to hear such direct appeals and *to decide them on the merits.*

STATE OF CALIFORNIA CONCERNED BY INVALIDATION OF ITS STATUTES AS REPUGNANT TO LAWS OF THE UNITED STATES.

The State of California is so concerned by the plight of its 2,280,452 savings depositors and homeowners resulting from invalidation of California State foreclosure and quiet title statutes, conferring jurisdiction on California Courts, that its Attorney General has filed California's *amicus curiae* brief herein, asking this Court to hear and decide this appeal on the merits.

The Congress became so concerned over appellees' threatened foreclosure of appellants, that Sections 501-3 of the Housing Act of 1954 were passed, amending and repealing the existing laws so as to expressly confer jurisdiction on the District Court in California to prevent these foreclosures.[2]

This Act of Congress became effective August 2, 1954. On September 16, 1954, *after* such enactments, the District Court made its quiet title judgments involved in these appeals.

The District Judge, Honorable Peirson M. Hall, made a respondent in original writ proceedings in the Court of Appeals, became so concerned that he asked his own separate and independent counsel to participate in the Court of Appeals and in this Court. District Judge Hall's *amicus curiae* brief is a part of this record on this appeal.

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[2]See Jurisdictional Statement, pp. 20-21.

CALIFORNIA STATUTES ARE INVALIDATED, BUT NOT MENTIONED BY COURT OF APPEALS' OPINION.

Appellees present but one basis for asking this Court to refuse to perform its duty conferred by Congress to hear these pleas of the State of California and appellant 8,000 homeowners. Such basis is that the *California State foreclosure and quiet title statutes conferring jurisdiction on California Courts, are not invalidated but only ignored by enjoining their enforcement without naming them.*

Appellees thus ask this Court to abandon its own jurisdiction to the vagaries of what the lower court *says, or fails to say,* and to ignore what the lower court *does.* Such is contrary to over a century of prior decisions of this Court.

McCullough v. Commonwealth of Virginia, 172 U. S. 102, 117:

> ". . . Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. . . ."[3]

The California statutes confer jurisdiction on California Courts by enacting §738:

> "An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim. . . ."[4]

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[3]Citing and quoting a multitude of prior decisions commencing with Chief Justice Marshall.

From 1829 to the present, this Court has consistently refused to permit the omissions of a lower court to defeat the jurisdiction of this Court. See pp. 8-9 of our Jurisdictional Statement.

[4]California Code of Civil Procedure §738.

> "§1050. [*Actions to determine adverse claims, and by sureties.*] An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; . . ."[5]

Jurisdiction created thereby applies to both Federal and State Courts sitting in California. *Rose v. Saunders*, 69 F. 2d 339 (C. A. 9, 1934); *Holland v. Challen*, 110 U. S. 15, 17; *Hopkins v. Walker*, 244 U. S. 486, 490; *Cities Service Oil Co. v. Dunlap*, 308 U. S. 208, 212.

California statutes enacting "An action may be brought" are clearly invalidated when dismissal of actions so brought is compelled by original mandamus. If any doubt of such invalidation yet remains, it is forever dispelled by the original injunction whereby appellants ". . . are perpetually enjoined . . . from instituting, . . . any other . . . action . . . in any other court, . . ." (Appx. B, p. 71).

That the mandamus and injunction are based upon "lack of jurisdiction of the District Court" only emphasizes the invalidation of California jurisdictional statutes.

Nor do the cases cited by appellees[6] apply. Here the decision of the Court of Appeals was not based upon lack of jurisdiction *under California law*, but upon repealed Acts of Congress.

The California statutes say "An action may be brought . . . for the purpose of determining such adverse claim. . . ."[7] The mandamus of the Court of Appeals says ". . . you are hereby commanded and enjoined . . . to . . . dismiss forthwith . . . all pleadings and

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[5]California Code of Civil Procedure, §1050.

[6]*Bradford Electric Light Co. v. Clapper*, 284 U. S. 221; *Public Service Commission of Indiana v. Batesville Telephone Co.*, 284 U. S. 6, cited at page 8 of appellees' motion to dismiss.

[7]California Code of Civil Procedure §§738, 1050.

proceedings . . . in said action . . ." (Appx. B, p. 62) *without* "determining such adverse claim".

Thereby the "determination" expressly required by California statutes, is prohibited and perpetually enjoined by the Court of Appeals' writs, under threats of imprisonment. The Writs say "Hereof fail not at your peril. . . ." (Appx. B, p. 63.)

APPELLEES' ADMISSIONS.

It is undenied that appellants relied on California State foreclosure and quiet title statutes for their defenses of their homes and savings, against appellees' $7,000,000 foreclosure.

It is undenied that the District Court prevented secret foreclosure of $7,000,000 of the savings deposits of 30,000 California savings depositors, and by quieting title prevented appellees' foreclosure of the homes of 8,000 California homeowners,—all in express reliance on California foreclosure and quiet title statutes, quoted and cited in the District Court's opinion.[8]

It is undenied that California statutes and law conferred jurisdiction for, and required exactly what the District Court did, *i.e.*, prevent foreclosure of loans fully paid and quiet the homeowners' titles.[9]

The Court of Appeals has not only invalidated California statutes, it has forever enjoined their enforcement.

The Court of Appeals has used its original writ of mandamus to nullify what the District Court was required

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[8]122 F. Supp. 401, at 422-424; 117 F. Supp. 259, at 290. See Jurisdictional Statement, p. 6, ftn. 9.

[9]See paragraph IV, Statutes Involved, p. 10 of our Jurisdictional Statement for text of California Civil Code, §§3011, 738, 1050, 739.

In *Tesseyman v. Jovick*, 130 Cal. App. 2d 384 (1955) (hearing denied by California Supreme Court) it was held at 388:

"Of course, if the trial court had determined that appellants owned the property it would have been error not to have quieted

to do, and did, under California statutes. And has used its original writ of injunction to prevent appellants using said California jurisdictional statutes to defend foreclosure of their homes or savings "in any other court," state or federal.[10]

Failure of the Court of Appeals to name or cite the California statutes it enjoins and invalidates, cannot obscure what the Court of Appeals *does* by its injunction and mandamus.

Appellees say (Motion to Dismiss, p. 7) ". . . these writs of mandamus and injunction do not void the state statutes. Appellant Long Beach Association, . . . remains free to defend the [foreclosure] suit of appellee San Francisco Bank . . ."

Appellees further say (Motion to Dismiss, p. 8), ". . . Likewise, the writs do not affect the rights of the parties to maintain quiet title actions, other than to confine the District Court to cases within its jurisdiction . . ."

But, appellees fail to tell this Court that *the quiet title judgments invalidated were made in appellees' own foreclosure action 13979, commenced by them as plaintiffs in California State Court,* under California jurisdictional statutes.

Appellees' foreclosure complaint prayed:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law;"

Filed by appellees in California State Court, such was a prayer *by appellees* for enforcement of *all* California law,

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appellants' title against disclaiming defendants. It would also have been error to grant a disclaiming defendant affirmative relief. (*Bradley Co. v. Ridgeway,* 14 Cal. App. 2d 326.)
" . . . .

And in the cited *Bradley* case the Court held, at page 337:

". . . As to Knupp the judgment should have quieted title against him since he was a defendant in the action who had disclaimed any interest in the bonds or in the real property described in the amended complaint."

[10]See Appx. B, p. 71.

including jurisdiction as well as defenses conferred by California foreclosure and quiet title statutes.[11]

Surely, the very Court appellees ask to foreclose, must have jurisdiction to refuse, as well as to grant, the prayed foreclosure.

As required by California statutes and law,[12] the District Court, *in appellees' own foreclosure action,* quieted appellants 8,000 California homeowners' titles against appellees' foreclosure. The District Court, also *in appellees' own foreclosure action,* prevented secret foreclosure prior to trial of $7,000,000 of savings deposits of 30,000 of appellants California savings depositors.

The simple truth is that because the California foreclosure statutes (invoked by appellees' own foreclosure complaint, filed by them as plaintiffs in California State Court) conferred jurisdiction which was exercised by the District Court to save, instead of to foreclose, 38,000 California homeowners and savings depositors, such California statutes have been invalidated by the Court of Appeals.

Even when appellees who sue are United States agencies, jurisdiction of the Courts cannot be so onesided that it exists only to foreclose, but cannot be used to save from illegal foreclosure.

Yet, that is the net result of the Court of Appeals' mandamus and injunction herein.

Mandamus has been used to dismiss defenses based upon California statutes; and Injunction has been used to prohibit using California statutes as defenses "in any other court" state or federal.

There can be no more drastic invalidation of California statutes than this. Yet, because the California statutes although cited and quoted in the District Court opinion,[13]

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[11]Appellees' foreclosure action was removed from California State Court to U. S. District Court. Remand has been denied by the District Court.

[12]See footnote 9 herein, and pages 5 to 8 of the *amicus curiae* brief of the State of California, for text of California statutes and appellate court decisions.

[13]See footnote 8 for references to pages of District Court opinion.

are not mentioned by *name* in the Court of Appeals' opinion, appellees claim such California statutes are not invalidated, and this Court is without jurisdiction.

No more substantial question can be presented to this Court than attempted obstruction of its jurisdiction by doing silently, what would require this Court's review if done openly.

Conclusion.

If these appeals be dismissed without hearing, a premium is placed upon evasion of the jurisdiction of this Court. A new road will thereby be opened for use of original writs of mandamus and injunction for invalidation of any statutes, federal or state. And so long as the invalidated and enjoined statutes remain unnamed, both Acts of Congress and the jurisdiction of this Court, can be safely thwarted.

This dangerous doctrine should be again rejected, as it has been rejected in over a century of prior decisions of this Court, by denial of the motion to dismiss.

These appeals should be heard and decided on their merits, as Congress enacted in 28 U. S. C. §1254(2).

Respectfully submitted,

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MAR 23 1956
WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 731

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, HOME INVESTMENT COMPANY,
Appellants,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

Brief of the Attorney General of California, as Amicus Curiae, in Support of Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 731

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, HOME INVESTMENT COMPANY,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

Brief of the Attorney General of California, as Amicus Curiae, in Support of Appellants.

Questions Presented.

Appellants, in their Jurisdictional Statement filed herein, state the questions presented by them on pages 14 and 15, to which this *amicus curiae* refers and with which it is in accord, as stating questions of real substance justifying the entertaining of this appeal. The particular concern of this *amicus curiae* relates to two questions which seriously affect the welfare of the citizens of California, in whose behalf this brief is presented, both of which questions are included in the Statement of appellants and are involved in the additional questions which they present. The two questions are:

1. Whether California statutes which afford protection and relief, both by quiet title judgments and by protection against secret foreclosures, can be denied effect, abrogated and invalidated as a result of previous decisions as to jurisdiction which were bottomed upon former Federal statutes which, subsequent to such decisions and while litigation was still pending, have been amended to provide jurisdiction.

2. Whether the Housing Act of 1954 is to be construed as impotent in affording a forum to adjudicate pending litigation on the merits, or whether its intent and effect is to be recognized as establishing and preserving jurisdiction for such adjudication.

The Interest of the Amicus Curiae.

This brief is filed by the Attorney General of California, as an *amicus curiae*, on behalf of the citizens of this state, in support of the appeal of appellants. It is our considered opinion that the issues involved are impressed with the public interest to such an extent that it becomes the duty of the Attorney General to take notice of the confusion and alarm which have been occasioned by the sweeping mandamus and injunction issued by the Court of Appeals for the Ninth Circuit, as a court of original jurisdiction, and to urge this Court to take jurisdiction of this appeal and resolve the questions presented.

We think it may not be gainsaid that considerations involving the savings and the homes of its citizens are the justifiable and cognizable concern of the state. Few things constitute more vital nerve centers. They intimately affect domestic tranquility and the general well-being of the state's entire social and economic structure. Experience has demonstrated the extreme sensitivity which

pervades the feeling of people, particularly those of moderate means, where the safety and protection of their savings and their homes are at stake. Uncertainty and fear occasion doubt and confusion, which past events have shown may lead to unrest and potentially to panic.[1]

In addition to and apart from its concern for the well-being of those of its citizens who are investors and depositors in institutions of Federal creation and control, the state has a very direct interest in the protection of those who have entrusted their earnings and placed their faith in like institutions chartered and regulated under its own laws. Under established authority (12 U. S. C. §§1724-1731) the deposits in *state* savings and loan associations are insured, to the extent of $10,000 of each account, in Respondent Federal Savings and Loan Insurance Corporation, a Federal corporation.[2]

The propriety of a state's interesting itself in situations akin to that here presented is apparent from the opinion of Mr. Justice Cardozo in *Hopkins Federal Savings & Loan Association v. Cleary,* 296 U. S. 315. There the

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[1]Note the $10,000,000 run in 1946 on the Long Beach Federal Savings and Loan Association.

See *Mallonee v. Fahey,* 14 Federal Rules Decisions 273, at 292:

". . . it appears from the records and files herein, and is not controverted, that immediately following the acts of said Ammann in taking possession of said Association and its assets on May 20th, 1946, a run of withdrawals occurred upon said Association, which amounted to approximately $10,000,000, ($6,000,000 of which occurred within the first six days following said seizure); . . ."

[2]The 8th Annual Report, 1954, Housing and Home Finance Agency, pp. 72-73, of which this Court takes judicial notice, shows that *in 1954 there were in California 144 state savings and loan associations with assets of $1,599,659,000 insured by the Federal Savings and Loan Insurance Corporation.* (In addition to these there were so insured 69 Federal savings and loan associations in California, having assets of $1,705,123,000.)

meaning and validity of an Act of Congress whereby building and loan associations organized under the laws of a state might be converted into Federal Savings and Loan Associations was in question. In that case the state was the suitor and this Court held (at pp. 335 and 337) that it properly assumed that status. It was stated that "the state is *parens patriae*, acting in a spirit of benevolence for the welfare of its citizens", and that "aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the *parens patriae* to keep faith with those who have put their trust in the parental power" (at pp. 340 and 341.) In the case here on appeal the state is not a suitor, nor has it essayed to become such. However, we think it neither far-fetched nor presumptive to express the view that there is here present "a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected" (at p. 339).

It is with this thought that this *amicus curiae*, without asserting any claim of right for the state to bring suit in the premises, feels the responsibility of pointing out the dangers to which sanction of the sweeping mandamus and injunction, from which appeal is sought, would precipitate—by denying quiet title judgments, and ~~preventing~~ permitting secret forclosures. We deem the striking down of state laws which afford needed protection (the applicability of which laws was respected by the trial court) and the denial of a forum for deciding issues on the merits (which was made available by the Congress in contemplation of the need therefor) as presenting serious questions and situations—not free from dangerous consequence and effect upon public confidence and trust—which are worthy of this Court's consideration on appeal.

The Invalidation of California Laws.

The appeal to this Court is sought by virtue of Title 28 U. S. C. §1254(2):

> ". . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States . . ."

The effect of the original mandamus and injunction appealed from is the striking down and invalidation of what appellants believe and the District Court held to be controlling provisions of California's statutes.[3]

Four notes were executed by the conservator of Long Beach Federal Savings and Loan Association, totaling

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[3](a) Text of California Foreclosure Statute Which Was Invalidated.

California Civil Code, §3011 reads in part:

"§3011. (*Pledgee may foreclose right of redemption.*) *Instead* of selling property pledged, as hereinbefore provided, a pledgee *may foreclose* the right of redemption by a *judicial sale*, under the direction of a competent court; and in that case may be authorized by the court to purchase at sale." (Emphasis added.)

(b) Text of California Quiet Title Statutes Which Were Invalidated.

California Code of Civil Procedure, §738, reads in part:

"§738. (*Action to quiet title to real and personal property.*) An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim . . ."

California Code of Civil Procedure, §1050 reads in part:

"§1050. (*Actions to determine adverse claims, and by sureties.*) An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; . . ."

California Code of Civil Procedure, §739 reads:

"§739. (*When plaintiff cannot recover costs.*) If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. (Enacted 1872.)"

in amount approximately $7,000,000, which, in addition to other security, assigned, pledged and hypothecated some 4,236 notes secured by trust deeds on the homes of approximately 8,000 homeowner-borrowers from appellant Association. Each of these notes contains this provision:

> ". . . This note shall be construed according to the laws of the state in which the principal office of the payee is situated." (Appx. I, p. 136.)[4]

Upon the removal of appellee conservator, he returned none of the said 4,236 homeowners' notes and trust deeds. This despite the fact that appellant Association twice tendered payment in full of the $7,000,000 alleged debt. After rejection of such payment by appellees, the District Court ordered return into the registry of said Court all of homeowners' notes and trust deeds. Appellees complied with the order. Thereafter the Court cancelled all said assignments and directed delivery of the notes and trust deeds to appellant Association, ordering the homeowners to make future payments to said Association. $7,000,000 of appellant Association's United States bonds and cash remained in Court to fully secure appellees. No appeal was ever taken from any of these orders.

Four years after surrendering possession of said 4,236 notes and trust deeds and the Court's cancellation of all assignments and endorsements thereof, appellee San Francisco Bank, on March 27, 1952, filed its Complaint to foreclose its claimed liens thereon. This was filed in the State court (Appx. II, pp. 217, 218), thereby recognizing the jurisdiction of that court and, obviously, the application of California's statutes by reason of the invoking of the

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[4](The principal office of appellee San Francisco Bank is in California.)

equitable remedies of foreclosure and declaratory relief. Thereafter this action was duly removed from the State court to the Federal District Court, and became No. 13979-P.H. therein.

This brings us to the disclaimer.[5] On November 30, 1953, plaintiff San Francisco Bank caused to be recorded in the official records of the County Recorder's Office of Los Angeles County (Book 43263 at pages 416-417 of Official Records) a document titled "Disclaimer", which referred to and encompassed said notes and trust deeds and the properties covered thereby. On January 18, 1954, plaintiff San Francisco Bank filed said Disclaimer in said case No. 13979. The Judge held this to be the effective date of the Disclaimer. (*Federal Home Loan Bank of San Francisco v. Long Beach Federal Savings and Loan Association*, 122 Fed. Supp. 401, 417. Appx. II, p. 222.) The lower court in said decision (p. 439) directed that summary judgments be entered in the note case (No. 13979) quieting title. (See Order and Judgment, Appx. II, pp. 248-258.)

The Court of Appeals treats of "The Disclaimer Issue" at length in the original mandamus and injunction which is the subject of this appeal. (Appx. B, pp. 41-46)[6]

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[5]For full text of the Disclaimer, see Appx. I, pp. 25, 26.

[6]In its Writ of Mandamus it commanded and enjoined the lower court, among other things, to dismiss in Civil Action 13979 in said District Court the *Cross-claim of Home Investment Company*, the Cross-claim filed by Long Beach Federal Savings and Loan Association, the Third Party Complaint filed by said Association, the Complaint in intervention and interpleader of Title Service Company, the Complaint in intervention of Robert H. Wallis, Complaint in intervention of John D. Willhoit. (Appx. B, p. 62.)

Home Investment Company is the class representative of the 8,000 homeowners. By its cross-claim it sought and obtained the quiet title judgments in favor of the homeowners and against the San Francisco Bank, *et al.* By dismissal of this cross-claim, without hearing or trial, the quiet title judgments made by the District Court, and based thereon, are nullified.

The effect of its writ of mandamus was to forestall and prevent any judgment quieting title. It commanded the immediate dismissal of the actions seeking this. In so doing it rendered nugatory and void not only Sections 738, 739 and 1050 of the California Code of Civil Procedure, but Section 3011 of the California Civil Code as well.

Throughout the entire discussion in the Court of Appeals' opinion of "The Disclaimer Issue" there is not a single mention of any California statute. Nor is the applicability or effect of the laws of California bearing upon the question even referred to. And this despite the fact that the lower court, in its Memorandum Opinion of June 10, 1954, dealt at length with the question of the disclaimer with relation to quieting title, citing California statutes and decisions of the California appellate courts, as well as those of Federal courts, and deciding that the effective procedure in this case was to quiet title. (Appx. I, pp. 24-41.)

In its Findings (No. 16) the lower court clearly points up the clouding of the homeowners' titles, the custom and usage prevailing in Southern California with regard to policies of title insurance and the necessity thereof for merchantability of property, and the grave and irreparable damage threatened by the inability of homeowner-borrowers to clear the titles to their real property. (Appx. II, pp. 208-209.) In its Conclusions of Law (Nos. 12 and 15) it held the moving parties entitled to quiet title judgments (Appx. II, pp. 245-246, 247) and so ordered in its Judgment (Pars. IX, X, XVIII), dated September 16, 1954. (Appx. II, pp. 252, 253, 257.)[7]

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[7]Judge Peirson M. Hall, of the District Court, cited and made a basis of his decision, the California State foreclosure and quiet

Nevertheless, the foreclosure complaint of Respondent San Francisco Bank still remains, unamended, and praying "for judgment foreclosing its aforesaid liens in the manner as provided by law; . . ." (Appx. II, pp. 217, 218, 220-221), which, of course, means the California law. The disclaimer, unless effectuated by a quiet title judgment, cannot remove a still pending prayer of the complaint for judicial foreclosure. The cloud remains on the title.

It is established law in California that where a disclaimer is filed a quiet title judgment must be entered. In *Tesseyman v. Jovick* (1955), 130 Cal. App. 2d 384 (rehearing denied by California Supreme Court) it was held, at 388:

> "Of course, if the trial court had determined that appellants owned the property, it would have been error not to have quieted appellant's title against disclaiming defendants. It would also have been error to grant a disclaiming defendant affirmative relief. (*Bradley Co. v. Ridgeway*, 14 Cal. App. 2d 326.) . . ."

And in the cited *Bradley* case the Court held, at page 337:

> ". . . As to Knupp the judgment should have quieted title against him since he was a defendant in the action who had disclaimed any interest in the bonds or in the real property described in the amended complaint.

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title statutes. At 122 Fed. Supp. 401, at 422-424, and at 117 Fed. Supp. 259, at 290, Judge Hall cited, quoted, and relied upon, California Code of Civil Procedure §§738-739, and 1050, and California Civil Code, §3011 and *Bulwer Consolidated Mining Co. v. Standard Mining Co.*, 83 Cal. 589.

Judge Hall is from the California Bar. Therefore, this Court gives special weight to his statement of what California law is.

Bernhardt v. Polygraphic Company, October Term, 1955, No. 49, Decided January 16, 1956 (100 L. Ed. Adv. No. 6, 203, 208):

> ". . . Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is . . ."

> "The judgment in so far as it refuses to grant any relief against the disclaiming respondent Guy Knupp is reversed with directions to the trial court to correct its judgment in accordance with the views herein expressed. . . ."

It has been noted that the Court of Appeals' opinion is totally silent as to any reference to California statutes. After extensive discussion of The Disclaimer Issue, it is content to rest the matter on this statement:

> ". . . That this sort of public record completely ties the hands of San Francisco Bank seems more than obvious, and we are thoroughly convinced that if any court was hereafter confronted with this record it would be more than justified in bluntly refusing to entertain, or tolerate, a suit by that Bank in which it sought, directly or indirectly, to assert any claim against or interest in the said real property of these individual 'home owners' if the claim arose out of the transactions here referred to and which were discussed in our Mallonee opinion. So much for the 'disclaimer.'" (Appx. B, p. 46.)

We think this may prove too much. While it may seem to the Court of Appeals that the disclaimer "completely ties the hands of San Francisco Bank" to assert any claim against the real property of the homeowners, such a statement falls far short of the effective relief of a quiet title judgment, which is required to be given under the laws of California. What in reality is done by this opinion of the Court of Appeals, effectuated by its mandate, is rather to "completely tie the hands" of the District Court and to manacle its power, as well as duty, to give the quiet title judgments required by the controlling law, judgments which are essential, if not indispensable, to

merchantable titles—as clearly set forth in the District Court's Findings of Fact. (Appx. II, p. 208.)

There can be no question but that by this disposition of the matter the Court of Appeals invalidated California foreclosure statutes and California quiet title statutes. That the Court chose not to expressly mention the State statutes it invalidated, despite the fact that the District Court had discussed them at considerable length, is of no consequence. It is clearly established by the decisions of this Court that such mention is totally unnecessary to vest jurisdiction in this Court when decisions below invalidate State statutes.

This is an appeal to this Court under Title 28 U. S. C. §1254(2):

> ". . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States, . . ."

Here State statutes were relied upon in the Court below. The Court of Appeals has denied effect to the State statutes. Appellant homeowners and savings depositors are "perpetually enjoined" by the Court of Appeals from defending against foreclosure and from obtaining quiet title judgments. And this in any court, whether State or Federal. California State statutes are thus invalidated as repugnant to laws of the United States.

This Court looks to substance and effect, rather than to form. In *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U. S. 1, 11, this Court said:

> ". . . if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. . . ."

And in *N. Y. Ex Rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, this Court held:

> ". . . it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough. (Citing authorities.)"

Another of California's laws has been invalidated by the Court of Appeals,—although here again it made no reference whatever to this law in its opinion. California Civil Code, Section 2889, provides:

> "§2889. (*Certain contracts void.*) All contracts for the forfeiture of property subject to a lien, in satisfaction of an obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."[8]

Each of the four conservator's notes contains this provision:

> ". . . This note shall be construed according to the laws of the state in which the principal office of the payee is situated." (Appx. I, p. 136.)

Appellee San Francisco Bank's principal office is in California, and appellees commenced their own foreclosure action in the Superior Court of the State of California, in and for the County of Los Angeles. Appellees' complaint prayed:

> "For judgment foreclosing its aforesaid liens in the manner as provided by law; . . ." (Appx. II, p. 218.)

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[8]In *Lowe v. Ozmun*, 3 Cal. App. 387 (Calif. 1906), the Court said at 393:

> ". . . The term 'private sale' comprehends something more than a mere taking over of the property by the pledgee at such price as he may elect to consider an offer. This is, in effect, but a declaration of forfeiture, an agreement for which is invalid under Section 2889, Civil Code. . . ."

Thus, appellees not only recognized the controlling effect of state laws; they sought judgment in accordance therewith.

In so doing they invoked all California law governing foreclosure proceedings, the controlling provision of which, as to any foreclosure of the right of redemption (sought by appellees under terms of doubtful validity found in the notes),[9] is set forth in California Civil Code Section 3011, which reads in part:

> "§3011. *(Pledgee may foreclose right of redemption.) Instead* of selling property pledged, as hereinbefore provided, a pledgee *may foreclose* the right of redemption by a *judicial sale*, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale." (Emphasis added.)

The District Court, in its Order for Deposit into Registry of September 16, 1954 (Appx. I, pp. 181-188) pointed up the dangerous import of the situation existing by stating that, in addition to certain refusals of the San Francisco Bank,

> ". . . by various statements by their counsel in Court, and from all proceedings had herein and in related matters, Federal Home Loan Bank of San Francisco threatens that unless the equity powers of this Court are exercised it will, or will attempt to,

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[9]The provisions of the notes read in part:

". . . payee may, . . . sell . . . the whole . . . collateral security, without any relief to the maker from any valuation or appraisement laws . . . at any public or private sale, without demand, advertisement or notice of the time or place of sale or of adjournments thereof, all of which are hereby expressly waived. The maker further waives any and all equity or right or redemption, whether before or after sale hereunder, and agrees that upon such sale the payee may become the purchaser . . . free from any such right or equity of redemption . . ." Appx. I, p 134-5

apply the said cash and interest coupons on said U. S. Government bonds, received by it upon said conservator's notes, and sell at private sale, without notice and without the right of redemption under claimed rights so to do, the said $5,300,000 Government bonds, thus putting it in a position to contend that, said notes will have been paid in full or in part, that thereby said action would then be moot, and for the right to dismiss Action No. 13979, without regard to the right of the Long Beach Federal Savings and Loan Association to litigate its claims on the merits concerning the validity of the notes and various agreements involved . . ."

We think that, as a result of the Court of Appeals' decision and the mandate and injunction effectuating it, there can be no question but that *both* sections of the California Civil Code (§3011 as well as §2889) are invalidated.[10] True, here again the Court of Appeals did not

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[10]See, also, other statutes—both State and Federal—which are nullified:

California Civil Code, §3005 reads:

"§3005. (*Sale of pledged property, manner of.*) The sale by pledgee, of property pledged, must be made by public auction, in the manner and upon the notice of sale of personal property under execution."

Sale of property under execution is regulated by California Code of Civil Procedure, §§692-694. §692 prohibits secret foreclosure sales. It reads in part:

"§692. (*Notice of sale under execution.*) Before the sale of property . . . notice thereof must be given as follows:

. . .

". . . for not less than five days . . ."

§692a authorizes the debtor to demand written notice of time and place of sale. §693 penalizes sales made without giving the demanded notice. §694 regulates the hours and place of sale, and authorizes the debtor to:

". . . if present at the sale, . . . direct the order in which property, real or personal, shall be sold, . . . and the sheriff, or trustees, must follow such direction."

choose to make mention of these provisions of California law, and was even silent as to the question of the inequity and the serious consequences which appellants show could eventuate. But, as has been pointed out, it is the substance and effect of the mandamus and injunction, rather than the manner of treatment or form of the opinion upon which the writs are predicated, which govern in rendering them subject to appeal here. It follows that this appeal should be entertained on the ground of the invalidation of state statutes.

U. S. statutes are similar. Title 28 U. S. C. §2004 reads in part:

"2004. *Sale of personalty generally.*

"Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of his title, unless the court orders otherwise."

"2001. Sale of realty generally.

"(a) Any . . . [property] sold under any order or decree of any court of the United States shall be sold . . . at public sale at the courthouse . . . *Such sale shall be upon such terms and conditions as the court directs.* (Emphasis added.)

"(b) After a hearing, of which notice to all interested shall be given . . . the court may order the sale . . . at private sale . . . upon such terms and conditions as the court approves. . . . No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published . . . at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."

Federal courts have uniformly, under their equity practice, enforced these and greater safeguards and protections at judicial foreclosure sales. Gelfert v. National City Bank, 313 U. S. 221, 231:

"The control of judicial sales . . . by courts of equity and by legislatures in order to prevent sacrificial prices has a long history . . .

". . . to prevent the machinery of judicial sales from becoming an instrument of oppression . . ."

The Housing Act of 1954.

The extensive and varied litigation which resulted in the numerous decisions of the Court of Appeals reviewed in its opinion was subject to and governed by the provisions of the Home Owners' Loan Act of 1933 and the National Housing Act. These decisions[11] were grounded upon a lack of jurisdiction and a failure to exhaust administrative remedies under the said laws in effect. The result was the prevention of the granting of relief sought.

The Congress took note of this. There followed two Congressional investigations, in the course of which this litigation received careful review and examination.[12] Following this the Congress adopted the Housing Act of 1954.[13] In Section 501 it amended the National Housing Act[14] and, in Section 503, the Home Owners' Loan Act of 1933, as amended.[15] By these two sections it furnished the

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[11]*Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; and *Fahey v. Calverley*, 208 F. 2d 197.

[12]"Hearings Before the Special Committee to Investigate Executive Agencies, House of Representatives, Seventy-Ninth Congress, Second Session, Pursuant to H. Res. 88, Part 7, Complaints of Federal Home Loan Bank of Los Angeles and Federal Savings and Loan Association of Long Beach Against the Federal Home Loan Bank Administration." "Hearings Before a Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-First Congress, Second Session, and Eighty-Second Congress, First and Second Sessions, Investigation of the Home Loan Bank Board."

[13]Public Law 560, 83rd Congress, Chap. 649, 2d Session, H. R. 7839, (68 Stat. 590.) See Appx. A, pp. 9 to 17.

[14]By §501(1), which amended §402(c)(4) of the National Housing Act, the Housing Act of 1954 made the Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725) subject to suit in the District Court. (See Appx. A, p. 9.)

[15]By §503(2), subsection (d) of §5 of the Home Owners' Loan Act of 1933, as amended, is amended (Appx. A, p. 12) to provide the following as to the Home Loan Bank Board:

". . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under

necessary jurisdiction for suits and the prevention of foreclosure of homeowners and savings depositors without trial. That there be no question as to its scope and effectiveness, Section 818 provided:

"Act Controlling.

"§818. In so far as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

The Court of Appeals rejected the view that the 1954 Housing Act set up jurisdiction for the adjudication of issues as to which it had theretofore held the lower court to be without jurisdiction to entertain. It chose to accept the view that the "language in question" (of the Act) is "purely prospective in its application." (Appx. B, p. 40.) The Housing Act of 1954 became effective August 2, 1954.[16]

Something needs be said here as to the purpose and intent of the Congress. Efforts were made by those opposing appellants here to exempt from the controlling

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this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia." (Appx. A, p. 14.)

§503(2) also provides:

". . . the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders . . ." (Appx. A, p. 14.)

[16]It is to be noted that the Findings of Fact, Conclusions of Law, and Judgment Quieting Titles, of the District Court in No. 13979 were filed, docketed and entered *September 16, 1954.* (Appx. II, p. 189.)

effect of the said Housing Act the original proceedings in the Court of Appeals seeking mandamus and injunction, and all of the pending litigation. While the bills passed by the Senate included such an exemption as to applicability,[17] that passed by the House did not. After submission to a Joint Conference Committee both Senate amendments were rejected and the statute as enacted is without such provision.

The language deleted was clearly pointed at appellants' situation. On June 17, 1954, the General Counsel of the Housing and Home Finance Company had addressed a letter to the Senate Committee on Banking and Currency in which he commented upon the above Senate exemptions as to applicability, stating that the objections thereto were unfounded and that there was but one pending suit to which the provisions of the Senate exemption in Section 503(2) would be applicable and that was "the California litigation."[18] Thereafter, the Senate receded and the Act, without the exemptions as to applicability, was passed by both Senate and House.

Thus, the intent and purpose of the Congress becomes obvious. However, the Court of Appeals (Appx. B, p.

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[17]To Section 501, the Senate added the language:

"'. . . Provided, that the provisions hereof relating to service of process shall not be applicable to any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

To Section 503(2), the Senate added the language:

"'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter or part thereof, of such pending action or suit.' . . ." (100 Cong. Rec. 6886-6887.)

[18]See Appx. A, p. 1, for copy of letter.

38) looks, for support to its position, to "the fact that nowhere in this language (Housing Act of 1954, §§503, 501) is found even a vague reference to a decision of any court which is to be affected by the language" and states that appellants have not shown "why this legislative language made no mention of this long controversy and the court decisions affecting it." (Appx. B, p. 38.) The opinion points to no authority requiring narrative of such nature. And one may look in vain for the slightest reference in the opinion to the legislative history of the attempted, but discarded, amendments to the Act,—the significance of which omission may not be readily dismissed. Strangely enough, in *Fahey v. O'Melveny & Myers*, 200 F. 2d 420, at 479, this same Court of Appeals, with reference to the subject of judicial review under the Act then in effect, had this to say:

> ". . . Nor has Congress since amended the Home Loan Bank Act to provide for such a review. The simplest kind of an amendment would have achieved such a result . . ."

It is clear that the provisions of Section 503(2) in question are those of procedural or adjective, rather than substantive law, and that as such they govern as to pending litigation. Indeed, the amendments purposed to shear them of such effect were deleted. But the opinion in this appeal chooses to refer to the bringing to issue and trial of pending actions, as well as new ones, as "a retroactive vesting of jurisdiction in the lower court to continue to entertain and to try actions instituted by respondent litigants after this Court had formally held the lower court to be without jurisdiction to entertain said actions and further held that the said Court should have dismissed these actions." (Appx. B, p. 40.)

Here again, we think the Court's statement proves too much. The plain import and the intent of the opinion is to convert, through some alchemy of transformation, its former decisions which were admittedly based upon lack of jurisdiction (at that time) into decisions of the issues on the merits, thereby to breathe into them the sanctity of *res judicata*.

But it goes without saying that an appellate court cannot decide the merits of a case which the trial court is without jurisdiction to hear. As succinctly stated in *United States v. Corrick*, 298 U. S. 435, at 440:

> ". . . While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit . . ."[19]

Mr. Justice Holmes had this to say in *Murray v. Pocatello*, 226 U. S. 318; 33 Sup. Ct. Rep. 107, at 108:

> ". . . Of course, if the Court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were . . ."

And on a question comparable to that here present, viz., as to what suits are embraced within the purview of Sec-

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[19]This rule is universal. See *S. S. Kresge Co. v. Amsler*, 99 F. 2d 503 (C. A. 8, 1938), at 507:

> "The lower court being without jurisdiction to determine the issues on the merits, this court is likewise without jurisdiction to do so, and we pretermit any discussion of them . . ."

In *Cramer v. Phoenix, Etc., Co.*, 91 F. 2d 141 (C. A. 8, 1937), at 144:

> ". . . The jurisdiction of the appellate court ends when it finds want of jurisdiction in the lower court . . ." (*Piedmont & N. R. Co. v. United States*, 280 U. S. 469, 478; *Smallwood v. Gallardo*, 275 U. S. 56, 62, *Smallwood v. Santani*, 275 U. S. 62, 63; *Stratton v. St. Louis Southwestern Railway Company*, 282 U. S. 10, 18; *Alabama v. United States*, 282 U. S. 502, 506.)

tion 503(2) of the Housing Act of 1954, this Court said in *Baltimore and Potomac Railroad Company v. Grant*, 98 U. S. 398, at 403:

> ". . . There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun . . . if it had been the intention to confine the operation . . . to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, . . ."[20]

In the face of what has been here reviewed, the Court of Appeals now "perpetually" enjoins appellants from defending, on the merits and in a court plainly clothed with jurisdiction, against foreclosure, and from obtaining quiet title judgments.

In considering all of the foregoing, it is to be borne in mind throughout that the new provisions of the Housing Act of 1954, which are the subject of controversy here, were invoked and made applicable and operative by the express terms of three documentary sources of basic importance. These are (1) the four conservator's notes

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[20]The Courts of Appeal agree. *Federal Reserve Bank of Richmond v. Kalin*, 77 F. 2d 50, 51 (C. A. 4, 1935):

> ". . . It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising. 'Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.' [citing authorities]."

In re Monsene, 74 F. 2d 411, 412 (C. A. 7, 1934); *Silurian Oil Co. v. Essley*, 54 F. 2d 43, 47 (C. A. 10, 1932); *Beatty v. United States*, 191 F. 2d 317, 320 (C. A. 8, 1951); *Bowles v. Strickland*, 151 F. 2d 419, 420 (C. A. 5, 1945); *Bowles v. Miller*, 151 F. 2d 992, 993 (C. A. 10, 1945).

sought to be foreclosed, (2) the charter of appellee San Francisco Bank, and (3) the charter of appellant Federal Savings Association.[21] And the Congress was specific as to the effect of this Act:

> "§818. In so far as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

We believe it has been shown (1) that the Housing Act of 1954 provides jurisdiction, (2) that it encompasses pending as well as future litigation, (3) that the previous decisions are of limited scope and effect and, being bottomed on jurisdictional tenets, do not foreclose such litigation, and (4) that the controlling effect of the presently existing jurisdiction was acknowledged and consented to at the roots or basic level of this litigation.

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[21]Each of the four alleged conservator's notes (totaling $7,000,000) contains a provision reading:

> "The rights, powers, and privileges conferred upon the Federal Home Loan Bank Board and/or member banks by the 'Federal Home Loan Bank Act,' approved July 22, 1932, as in force at the date of the execution hereof *and/or as hereafter amended*, are hereby made a part of the provisions of this note . . ." (Emphasis added.) (Appx. I, p. 136.)

The charter of Federal Home Loan Bank of San Francisco reads in part:

> "6. This Certificate is made for the purpose of carrying out the provisions of the Act of Congress, known and cited as the *Federal Home Loan Bank Act*, approved July 22, 1932, *and such other acts as may be passed by Congress amending or supplementing* the said Federal Home Loan Bank Act, in so far as it or they may be applicable to the Federal Home Loan Bank . . ." (Emphasis added.)

The charter of appellant Long Beach Association, Sec. 3, Objects and Powers, reads in part:

> ". . . The Association shall have such powers . . . in conformity with the *Home Owners' Loan Act of 1933 and all laws of the United States as they now are, or as they may hereafter be amended* . . ." (Emphasis added.)

Conclusion.

Statutes of the State of California which are controlling herein and which afford protection to innocent victims of the litigation here involved have been invalidated by the Court of Appeals.

The failure of that Court to expressly mention in its opinion the state statutes which were invalidated thereby is of no consequence. The effect of its mandate and injunction clearly gives this Court jurisdiction over this appeal. (28 U. S. C. §1254(2).)

By both its intent and effect, the Housing Act of 1954 endows the District Court with jurisdiction for the determination of the issues embraced in this litigation.

The Congress gave these appellants, who rely on California state statutes invalidated as repugnant to laws of the United States, a right of direct appeal to this Court. We think such right should not be denied by dismissal of this appeal without hearing.

For the reasons set forth, this *amicus curiae* submits that this appeal should be entertained, and the decision of the Court of Appeals reviewed and reversed.

Respectfully submitted,

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March, 1956.